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SUMMARY REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION

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The Work of the International Law Commission at Its Fifty-Third Session (2001)

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I. Introduction

The International Law Commission held its fifty-third session in Geneva from 23 April to 1 June and 2 July to 10 August 2001. Under the chairmanship of Mr. Peter C.R. Kabatsi from Uganda, the Commission addressed five topics: State responsibility, Prevention of transboundary harm from hazardous activities, Reservations to treaties, Diplomatic protection, and Unilateral acts of States.[1]

The Commission completed its work on two long-standing topics: State responsibility and Prevention of transboundary harm from hazardous activities.

With regard to State responsibility, discussion focused on the fourth report presented by the Special Rapporteur, which dealt with four outstanding issues: the inclusion of specific consequences for serious breaches of obligations deriving from peremptory norms of international law, countermeasures, the eventual form of the draft articles to be proposed to the General Assembly, and finally dispute settlement. Moreover, the Drafting Committee reviewed all draft articles and finalized the second reading text. The Commission ultimately adopted a set of fifty-nine draft articles[2] along with elaborate commentaries. The Commission recommended to the General Assembly to take note of the draft articles and annex the text of the articles to its respective resolution.

Furthermore, the Drafting Committee undertook a comprehensive review of the draft articles on "International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary harm from hazardous activities)." The Commission adopted nineteen draft articles[3] with commentaries and recommended to the General Assembly the elaboration of a convention on the basis of these articles.

Concerning "Reservations to treaties," the Commission considered addenda 3 and 4 of the fifth report as well as the sixth report presented by the Special Rapporteur. As concerns the contents of the fifth report, twelve draft guidelines regarding confirmation of reservations made when signing, late formulation of reservations, and procedures regarding interpretative declarations were referred to the Drafting Committee and subsequently adopted by the Commission.[4] Following discussion of the sixth report, the Commission referred thirteen draft guidelines regarding the form and notification of reservations and interpretative declarations and the publicity of reservations and interpretative declarations to the Drafting Committee for consideration at the fifty-fourth session in 2002.

Debate with regard to Diplomatic protection focused on two issues: the rule of continuous nationality, based on addendum 1 to the first report presented by the Special Rapporteur in 2000, and the rule of exhaustion of local remedies, in which regard the Special Rapporteur had proposed a set of draft articles in his second report of 2001. The Commission ultimately referred draft Articles 9, 10, and 11 to the Drafting Committee for consideration at the fifty-fourth session in 2002, which is to take into account the recommendations of an informal working group on the wording of Article 9 on continuous nationality.

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[1] For the official report of the Commission to the General Assembly see *International Law Commission, Report on the work of its fifty-third session, Official Records of the General Assembly,* Fifty-Sixth Session, Supplement No. 10 (A/56/10).

[2] Text *infra* Annex I.

[3] Text *infra* Annex II.

[4] Text *infra* Annex III.

With regard to Unilateral acts of States, the Special Rapporteur introduced his fourth report, which addresses the classification of unilateral acts and presents two draft articles on general rules of interpretation. A Working Group on Unilateral acts was convened to consider future work on the topic and to formulate a questionnaire regarding State practice.

In response to paragraph 14 of General Assembly resolution 55/152, the Commission indicated specific issues with respect to Reservations, Diplomatic protection, and Unilateral acts on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work. A short overview of other matters dealt with by the Commission or concerning its activity is given at the end of the present report.[5]

[5] See *infra* Chapter VII.

II. State Responsibility[6]

A. Introductory Remarks

At its fifty-third session, the International Law Commission completed its work on "Responsibility of States for internationally wrongful acts"[7] by adopting of a set of fifty-nine draft articles along with commentaries comprising around 300 pages of text.

Discussion at this year's session focused on the fourth report presented by Special Rapporteur James Crawford, which dealt primarily with comments from Governments on four outstanding issues relating to the draft articles: the inclusion of specific consequences for serious breaches of obligations owed to the international community as a whole (respectively, deriving from *ius cogens)*, countermeasures, the eventual form of the draft articles to be proposed to the General Assembly, and the inclusion *vel non* of dispute settlement provisions. Moreover, the commentaries to the draft articles were discussed. The Commission established two working groups to resolve the main outstanding issues and consider the commentaries respectively. Ultimately, the Commission decided to refer all of the articles to the Drafting Committee, subsequently reviewed all draft articles again in plenary and finalized the second-reading text, taking into account the comments made by Governments in the Sixth Committee.

The following description will focus on the changes made with regard to the articles provisionally adopted by the Drafting Committee in August 2000 and considered in my report of last year.[8]

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[6] In response to General Assembly resolution 799 (VIII) of 1953, requesting the Commission to undertake the codification of the principles of international law concerning State responsibility, the Commission at its seventh session in 1955 decided to take up the topic. Mr. F. V. Garcia Amador was appointed Special Rapporteur. He focused on the codification of substantive rules of injuries to aliens and property. For the six reports of the Special Rapporteur from 1956 to 1961, *see Yearbook … 1969,* vol. II, p. 229. In 1963, the Commission appointed Mr. Robert Ago as new Special Rapporteur, and abandoned the approach of dealing with primary rules, instead focusing on the secondary rules of State responsibility (i.e., rules governing the legal regime of breaches of international law and their consequences). For the eight reports of Special Rapporteur Ago, *see Yearbook … 1969,* vol. II, A/CN.4/217 and Add. 1, pp. 125-156; *Yearbook … 1970,* vol. II, A/CN.4/233, pp. 177-198; *Yearbook … 1971,* vol. II (Part One), A/CN.4/246 and Adds. 1-3, p. 199; *Yearbook … 1972,* vol. II, A/CN.4/264 and Add. 1, p. 71; *Yearbook … 1976,* vol. II (Part One), A/CN.4/291 and Add. 1-2, pp. 3-55; *Yearbook … 1977,* vol. II (Part One), A/CN.4/302 and Add. 1-3; *Yearbook … 1978,* vol. II (Part One), A/CN.4/318 and Add. 1-4 and *Yearbook … 1980,* A/CN.4/318/Add. 5-7. At its thirty-second session in 1980, the Commission provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". See *Yearbook … 1980,* vol. II, (Part Two), pp. 26-63, A/35/10, chap. III. From 1980 to 1986 the Commission received seven reports from Mr. Willem Riphagen, the successor as Special Rapporteur to Mr. Ago, dealing with Parts Two and Three of the topic. See *Yearbook … 1980,* vol. II (Part One), p. 107, A/CN.4/330; *Yearbook … 1981,* vol. II (Part One), p. 79, A/CN.4/334; *Yearbook … 1982,* vol. II (Part One), p. 22, A/CN.4/354; *Yearbook … 1983,* vol. II (Part One), p. 3, A/CN.4/366 and Add. 1; *Yearbook … 1984,* vol. II (Part One), p. 1, A/CN.4/380; *Yearbook … 1985,* vol. II (Part One), p. 3, A/CN.4/389; and *Yearbook … 1986,* vol. II (Part One), p. 1, A/CN.4/397 and Add. 1. In 1987 the Commission appointed Mr. Arangio-Ruiz as new Special Rapporteur. For the eight reports he presented, see *Yearbook...1988,* vol. II (Part One), p.6, A/CN.4/416 and Add.1; *Yearbook...1989,* vol. II (Part One), p.6, A/CN.4/425 and Add.1; *Yearbook...1991,* vol. II (Part One), p.1, A/CN.4/440 and Add.1; *Yearbook...1992,* vol. II (Part One), p.1, A/CN.4/444 and Add. 1-3; *Yearbook...1993,* vol. II (Part One), p.1, A/CN.4/453 and Add.1 and Corr. 1-3 and Add.2 and 3; doc A/CN.4/461 and Add. 1-3; A/CN.4/469 and Add. 1 and 2 and A/CN.4/476 and Add.1. At its forty-eighth session in 1996, the Commission completed the first reading of the draft articles of Part Two and Three. For the text see *International Law Commission, Report on the work of its forty-eighth session*, *Official Records of the General Assembly*, Fifty-first Session, Supplement No. 10 (A/51/10), pp. 125-151. In 1997, the Commission appointed Mr. James Crawford as Special Rapporteur and started with the process of the second reading. Mr. Crawford presented his first report in 1998 (A/CN.4/490 and Add. 1-6) and his second report in 1999 (A/CN.4/498 and Add. 1-4). In 1998, taking into account the comments of governments, the Commission completed the second reading of Chapters I and II of Part One. In 1999, the Commission completed the second reading of Part One. In 2000, the Commission reconsidered the draft articles in light of comments by governments (see A/CN.4/488 and Add. 1-3 and A/CN.4/492). For this purpose the Commission had before it the third Report of the Special Rapporteur, which was primarily concerned with consequences of serious breaches of obligations *erga omnes* and countermeasures (A/CN.4/507). In August 2000, the Drafting Committee provisionally adopted a complete set of draft articles (for the text see A/CN.4/L.600 or A/55/10, pp. 124-140) to be considered by the Commission in 2001, in light of comments by Governments.

[7] Hereinafter: "State responsibility".

[8] *Nordic Journal of International Law* 70, 183 (2001).

B. Consideration of the Draft Articles

Title of the topic

In order to address the concern that the short title "State responsibility" did not sufficiently distinguish the topic from the responsibility of the State under *internal* law, the Commission adopted the new title “Responsibility of States for internationally wrongful acts,” which emphasizes the exclusive relevance of the articles to international responsibility.

Part One, Chapter I, Articles 1 – 3

These provisions were adopted unchanged with regard to the text elaborated last year by the Drafting Committee.

Part One, Chapter II, Articles 4 – 11

The Commission adopted a more logical order of the articles under Chapter II, [9] which formulate criteria for the attribution of conduct to a State. Attribution in Articles 4 – 7 is based on the criterion of the exercise of elements of governmental authority by organs, persons and entities. By contrast, Articles 8 – 11 deal with certain additional cases where conduct not of a State organ or entity is nonetheless attributable to a State on the basis of other criteria. The new grouping emphasizes the systematic link of what is now Article 7 on *ultra vires* conduct of organs, person and entities acting in exercise of governmental authority to Articles 4 – 6.

In addition, the use of the terminology of “persons and entities” was standardized wherever such reference was appropriate. Where reference was made to individuals or groups without legal personality who nonetheless act as a collective, the terminology “person or group of persons” was retained. The terminology is thus consistent with the draft articles on Jurisdictional Immunities of States and their Property, adopted by the Commission in 1991.

The title of the chapter was changed to “Attribution of conduct to a State” since the connotations of the old title “Act of the State” appeared to be potentially confusing.

Part One, Chapter III, Articles 12 – 15

Articles 12 – 15 outline in general terms the conditions under which State conduct constitutes a breach of an international obligation. Since the principal focus in determining this question will be on primary norms, no attempt was made in this chapter to include a specific definition of when a breach occurs.

Some debate was stirred by the proposal to add a fourth paragraph to Article 14 in order to explicitly cover the case where an obligation is limited to preventing the occurrence of an event and does not extend to its continuation. Since the Commission was cautious not to trespass on the scope of primary obligations, the inclusion of such a paragraph was rejected. The commentaries, however, clarify that while typically the breach of an obligation of prevention will be a continuing one, cases can be envisaged where only the occurrence of a certain event constitutes a breach. Both qualifications are intended to fall under Paragraph 3 of Article 14.

Articles 12 – 15 were finally adopted with only minor drafting changes.

[9] Articles 4 and 5 retain the same numbering. Article 6 corresponds to Article 8 in last year’s draft articles, Article 7 to Article 9, Article 8 to Article 6, Article 9 to Article 7. Articles 10 and 11 retain the same numbering.

Part One, Chapter IV, Articles 16 – 19

The Commission made only few drafting changes to these articles, which deal with internationally wrongful conduct that results from the collaboration of several States. The title of this Chapter was changed, however, from “Responsibility of a State in respect of the act of another State” to “Responsibility of a State in connection with the act of another State.” The new wording is intended to emphasize that the responsibility of a State under this Chapter arises for the conduct of another State.

Some governments had suggested that the requirement formulated in Articles 16, Subparagraph (a), and 17 to the effect that the acting State must have knowledge of the circumstances of the wrongful act, conflicted with the concept of objective responsibility. However, the Commission decided to retain the criterion of knowledge to avoid unnecessarily broadening responsibility under this Chapter and thus rendering it unacceptable to many States.

Moreover, proposals to replace "direct *and* control" in Article 17 with "direct *or* control" to achieve consistency with Article 8 were rejected. Whereas in the context of Article 8, in practice only the directing State could be internationally responsible, under Article 17 two States were involved, so that the retention of the stricter requirement of “direct *and* control” seemed appropriate.

Part One, Chapter V, Articles 20 – 27[10]

Articles 20 – 24 dealing with consent, self-defence, countermeasures and *force majeure* as circumstances precluding wrongfulness were subject only to minor changes.

As to the issue of countermeasures, the Commission agreed to include a narrowly phrased provision from the perspective of circumstances precluding wrongfulness into Article 22 of Part One, Chapter V. Explicit reference in Article 22 to Part Three, Chapter II emphasizes that Article 22 only covers such measures that qualify as countermeasures under that later chapter.[11]

Article 23, Paragraph 2, Subparagraph (a) emphasizes that *force majeure* cannot be invoked by a State which has caused that situation by its own conduct. The old formulation “results” appeared to be too broad since it could imply the existence of other causal factors. The Commission decided to replace “results” with “is due ... to” to stress the direct causal nexus that must exist between the conduct of the State and the situation of *force majeure*. In addition, “occurrence” was replaced with “situation” or “situation occurring” in Paragraph 2, Subparagraphs (a) and (b).

In Article 24 the original words "results ... from" were changed to "is due ... to" in order to make the language consistent with Article 23.

Article 25 defining necessity provoked debate on two issues. Firstly, the Commission discussed whether a distinction between the concepts of “essential interests” (Article 25), “fundamental interests” (last year’s Article 41), and “collective interests” (Article 48) was justified. Since the distinction between essential and non-essential interests has been widely applied in the context of necessity, and fundamental interests are by their very nature not capable of being divided into such categories, the Commission decided to retain the reference to “essential interests” in Article 25. Secondly, Article 25 contains a first reference to the notion of the “international community as a whole”, which the Commission considered preferable to the concept of the “international community *of States* as a whole.[12]

Article 26 is formulated as a general provision applying to all circumstances precluding wrongfulness in Chapter V. States cannot rely upon a circumstance precluding wrongfulness in Chapter V with respect to conduct that violates a peremptory norm. In

[10] Former Article 21 was moved to become Article 26. Accordingly, this year’s Articles 21 – 25 correspond to former Articles 22 – 26.
[11] As to the regime of countermeasures in the draft, see *infra* Articles 49 – 54.
[12] Cf. *infra* discussion of Article 33 for an overview of the debate.

previous drafts, such a clause had only been included in some, but not all, of the provisions in Chapter V, thus resulting in a case-by-case reference to *ius cogens*.

Part Two, Chapter I, Articles 28 – 33

The articles in Part II focus on the legal consequences of an internationally wrongful act of a State. Chapter I spells out general principles, Chapter II specifies the concept of reparation for injury, and Chapter III addresses specific consequences for serious breaches of oblgations of a *ius cogens* character.

The six articles in Chapter I of this Part were adopted without any major changes. They place equal emphasis on cessation, resumption of the performance of the obligation breached, and assurances of non-repetition on the one hand as on reparation on the other.

While the duty spelled out in Article 30, Subparagraph (b) to provide appropriate assurances and guarantees of non-repetition in certain cases may constitute a progressive element, the existence of such a remedy under international law was recently confirmed by the International Court of Justice.[13] The great majority of members accordingly favoured the retention of Article 30, Subparagraph (b).

Article 31 links the obligation to repair a wrong to the existence of injury. Some Governments had questioned whether it was useful to introduce the concept of "injury" in addition to the concept of "damage." The Commission felt, however, that "injury" was a broader concept than "damage," as it comprises besides material and moral damage so-called "legal injury" to a State. In order to reflect this distinction, the concept of "injury" was retained and the words "consists of" in last year's draft, which would have limited the notion of injury to material and moral damage, were replaced with the broader term "includes." Moreover, the Commission refrained from including a general provision on proportionality, since proportionality may apply differently to different forms of reparation.

With regard to Article 33,[14] some Governments had suggested that the notion of "international community as a whole" should be replaced with "international community *of States* as a whole" to achieve consistency with the Vienna Convention on the Law of Treaties. The Commission noted that the words "of States" in the Vienna Conventions were intended to emphasize the paramount role of States in the making of international law. In the context of State responsibility, however, the Commission found it appropriate to acknowledge that international obligations may exist towards other entities besides States, and consequently opted for a reference to the "international community as a whole."

Part Two, Chapter II, Articles 34 – 39

Articles 34 – 39 concerning the forms of reparation for injury (restitution, compensation and satisfaction) were retained in substantially the same form as they had been provisionally adopted by the Drafting Committee last year.

Debate focused on the concepts of "damage" in Article 36 and "injury" in Article 37. The Commission concluded that "moral damage," meaning pain and suffering, could not give rise to a duty of compensation by virtue of Article 36, Paragraph 2. Satisfaction, by contrast, only requires the existence of "injury," which is not associated with actual damage to persons or property.

Part Two, Chapter III, Articles 40 and 41

The Commission widely recognized that the evolution of the concepts of *ius cogens* and obligations *erga omnes* has implications on the secondary rules of State responsibility which must be reflected in the draft articles. After an initial attempt to draw a distinction between international crimes and international delicts (Article 19 of the first-reading text) had

[13] *LaGrand, Merits,* judgment of 27 June 2001, paras 123 – 127, para 128(6),(7).
[14] Article 33 corresponds to Article 34 in last year's draft articles. Article 33 of last year was moved to Part IV.

been rejected, last year's draft articles had attached specific consequences to breaches of *erga omnes* obligations in this chapter.

At the fifty-third session, Chapter III underwent, again, heated debate, which ultimately resulted in a fundamental conceptual change. While most members supported the inclusion of a separate chapter, a majority of members favoured substituting the concept of "obligations owed to the international community as a whole" with the related concept of "peremptory norms." Most members felt that the notion of obligations owed to the international community as a whole focussed on the interest of all States in compliance, whereas the notion of peremptory norms was concerned with the priority to be given to certain obligations. Therefore, it seemed appropriate to attach specific consequences in case of a breach of a norm to the peremptory nature of such a norm rather than to its *erga omnes* character. Moreover, the concept of peremptory norms was believed to have the practical advantage over obligations *erga omnes* of being well-established in the Vienna Convention on the Law of Treaties. By contrast, a State is only entitled to invoke responsibility if the obligation breached is owed to that State either individually or as a member of a specific community. Hence, in Article 48 the concept of obligations *erga omnes* was retained.

Moreover, the particular consequences under this chapter can only arise if the breach of a peremptory norm is in itself serious, having regard to its scale or character. Since Chapter III thus only covers grave breaches of obligations of fundamental importance, the qualifier "risking substantial harm to the fundamental interests protected hereby" in Article 40[15] was considered superfluous and was consequently deleted.

Debate on Article 41[16] focussed on the obligation to pay damages reflecting the gravity of a breach, spelled out in former Paragraph 1. Many members questioned whether such an obligation separate from reparation had a sufficient basis in State practice. Consequently, Paragraph 1 was deleted. However, the without-prejudice clause of Paragraph 3 emphasizes that an obligation to compensation can arise under Chapters I and II of Part Two.

Part Three,[17] Chapter I, Articles 42-48

Chapter I concerns the right of States to invoke the responsibility of another State. Central to the invocation of responsibility is the concept of the "injured State." Article 42 introduces this concept and various consequences are drawn from it in Articles 43 – 47. However, under certain conditions, spelled out in Article 48, even States other than injured States have a right to invoke responsibility.

As regards Article 42,[18] the concept of integral obligations, now embodied in Subparagraph (b)(ii), had created considerable confusion among Governments and was consequently subject to renewed consideration in the Commission. The Commission ultimately dismissed proposals to delete entirely any reference to integral obligations, because the regime of invocation was otherwise not believed to take adequate account of the systematic characteristics of this narrow but important category. The inclusion of Subparagraph (b)(ii) emphasizes that a State whose position with regard to the performance of an integral obligation is radically changed by the breach of another State is entitled to resort to all means of redress granted to "injured States" in the articles, including countermeasures (which may often, absent any financially assessable damage, constitute the only effective means of redress available). The Commission attempted to accommodate concerns by Governments by redrafting the provision, aligning it closely to the language of Article 60(2)(c) of the Vienna Convention on the Law of Treaties.

Moreover, the title of Article 42 was changed to "Invocation of responsibility by an injured State".

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[15] Article 40 corresponds to Article 41 in last year's draft articles.
[16] Article 41 corresponds to Article 42 in last year's draft articles.
[17] Part Three corresponds to Part Two *bis* in last year's draft articles.
[18] Article 42 corresponds to Article 43 in last year's draft articles.

Articles 43 – 47[19] were adopted in substantially the same form as proposed last year by the Drafting Committee.

The title of Article 43 was changed to "Notice of claim by an injured State."

In the context of Article 45, some Governments had proposed that injured States could not waive claims arising from the breach of a peremptory norm, in line with Part One, Chapter V. However, the Commission considered that a distinction had to be drawn between validity in the context of circumstances precluding wrongfulness and the validity of a waiver of a claim. Whereas valid consent to the violation of peremptory norms is excluded in the context of circumstances precluding wrongfulness, nothing can preclude the freedom of States to waive their right to invoke responsibility under this chapter. Consequently, the Commission did not consider it necessary to rephrase the article so as to exclude waivers of claims arising from the breach of peremptory norms.

The title of Article 46 was changed to "Plurality of injured States," and that of Article 47 to "Plurality of responsible States." There was agreement among the Commission that Article 47 was not to be read as recognizing the concept of joint and several liability, since the general rule in international law remains that of separate responsibility for internationally wrongful acts, even if committed in concert with others.

Article 48[20] had – with the exception of one Government –been generally endorsed by States. Paragraph 1 recognizes the right of non-injured States to invoke State responsibility in case of breach of two types of collective obligations, namely obligations *erga omnes partes* and obligations *erga omnes* in the *Barcelona Traction* sense. In so doing, States do not act in their individual capacity but as members of a group of States to which the obligation is owed, or as members of the international community as a whole. Paragraph 2 lists exhaustively the forms of redress which non-injured States are entitled to claim.

The Commission decided to add the words "of the group" to Paragraph 1, Subparagraph (a), to narrow the provision. It now specifies that non-injured States can only invoke responsibility if the obligation *erga omnes partes* breached has been established for the protection of a collective interest of precisely this group of States.

With respect to Paragraph 2, the question was controversial whether non-injured States should be entitled to claim assurances and guarantees of non-repetition, and the performance of the obligation of reparation. While this provision is undeniably an example of progressive development, the Commission believed that Paragraph 2 can adequately give effect to the rationale of collective obligations by providing means of protecting the community or collective interest at stake. Paragraph 2 was consequently retained.[21] Of course, recourse to the remedies just mentioned on the part of a non-injured State can only be had in the interest of the injured State or of the (non-State) beneficiaries of the obligation breached.

Part Three, Chapter Two, Articles 49 – 54

Chapter Two of Part Three on countermeasures had attracted controversial comments both by Governments and in the Commission.

Article 49[22] had generally been endorsed in substance. The proposal by one Government to limit the function of countermeasures to inducing compliance with the primary obligation was debated. In the view of the Commission the mere resumption of the performance of an obligation is, however, insufficient where damage has already occurred. Moreover, State practice does not seem to support such a restrictive concept of

[19] Articles 43, 44, 45, 46, 47 correspond to Articles 44, 45, 46, 47, 48 in last year's draft articles.
[20] Article 48 corresponds to Article 49 in last year's draft articles.
[21] Cf., however, the decision of the Commission to delete the former Article 54 which had granted non-injured States qualifying under this Article an additional right to engage in countermeasures, for more details see *infra* Article 54.
[22] Article 49 corresponds to Article 50 in last year's draft articles.

countermeasures. Therefore, the Commission retained the reference to compliance with all obligations under Part Two, thus including the inducement to compliance with the obligation to provide reparation.

For purposes of clarification the Commission substituted the words “non-performance” for “suspension of performance” (Paragraph 2) and the words “as to permit the resumption” for “as not to prevent the resumption” (Paragraph 3).

With regard to Article 50,[23] some Governments were concerned that the word “derogation” could create confusion with non-derogability clauses in the field of human rights. To accommodate this concern, Article 50 now provides that countermeasures “shall not affect” the obligations specified in Article 50.

The Commission pointed out that Paragraph 1, Subparagraph (d) is not intended to qualify the obligations referred to in the preceding Subparagraphs as peremptory. Nonetheless, to deal with the inviolability of diplomatic and consular personnel in Paragraph 1 was considered potentially confusing, since in the view of the Commission this obligation is not of a peremptory character and States may in principle waive the inviolability of their diplomatic and consular agents. Rather, the *ratio* of excluding the inviolability of these persons from the scope of countermeasures lies in the essential importance of diplomatic channels for the peaceful settlement of disputes; thus, the obligation to protect the inviolability of diplomatic and consular agents was moved to Paragraph 2.

In respect to Article 51[24] various drafting proposals were considered. The Commission, however, ultimately decided to retain the article as it was, because the term “commensurate” was in line with the jurisprudence of the ICJ in the *Gabcíkovo-Nagymaros* case.

Article 52[25] gave rise to controversial debate on substantial issues.

Paragraph 1 spells out obligations incumbent on States before resorting to countermeasures: the obligations to request compliance and to notify the other State of the intent to take countermeasures. The merger of both obligations in a single paragraph emphasizes that the notification of a State’s intent to take countermeasures shall be given *before* resort to countermeasures is made.

Moreover, the distinction between countermeasures and provisional countermeasures was given up. The rationale for this decision was that, by virtue of Paragraph 3, all countermeasures are of a provisional nature. Consequently, Paragraph 2 now only allows for *urgent* countermeasures necessary for the protection of a State’s rights. Former Paragraph 3, which had limited countermeasures taken during *bona fide* negotiations to provisional countermeasures, was deleted entirely, because many members regarded countermeasures as a legitimate and useful instrument to uphold pressure during the negotiation process. The Commission noted, moreover, that the deletion of former Paragraph 3 brought the draft articles in line with the ICJ ruling in the *Gabcíkovo-Nagymaros* case and the *Air Service* arbitral award, which acknowledged the right to resort to countermeasures during negotiations.

Paragraph 3 was adopted with the minor drafting change of replacing “within a reasonable period of time” with “without undue delay”. Debate, however, focused again on the question which criteria a court or tribunal must meet in order to give rise to the obligation to suspend countermeasures under Subparagraph (b). The Commission noted that the rationale of this Paragraph is that the injured State may request a court or tribunal to order measures in protection of its rights, which will make countermeasures unnecessary. In the view of the Commission this rationale, however, applies only if the court or tribunal has the power to issue provisional measures. As specified in the commentaries, Subparagraph (2) is

[23] Article 50 corresponds to Article 51 in last year’s draft articles.
[24] Article 51 corresponds to Article 52 in last year’s draft articles.
[25] Article 52 corresponds to Article 53 in last year’s draft articles. Paragraph 1 and 2 of last year were merged to Paragraph 1. Paragraph 2 corresponds to Paragraph 3 in last year’s draft articles, Paragraph 3 to Paragraph 5, and Paragraph 4 to Paragraph 6.

accordingly intended to cover only courts and tribunals that have jurisdiction over the dispute and the competence to issue provisional measures.

Article 53[26] had received general support from Governments and was not subject to changes.

Article 54 provisionally adopted by the Drafting Committee last year, granting non-injured States a limited right to countermeasures, provoked considerable controversy among Governments as well as in the Commission. Since Article 48 allows the invocation of State responsibility by non-injured States in the collective interest, some members believed that these non-injured States should accordingly be entitled to take countermeasures in the collective interest also. By contrast, other members favoured limiting the right to resort to countermeasures to injured States. The Commission finally concluded that the state of development of the law did not yet allow a definite answer to this question. It ultimately decided to replace former Article 54 with a saving clause that reserves either position and does not prejudice future developments in international law. In this light, the broader term "lawful measures" was considered preferable to the notion of "countermeasures".

Part Four, Articles 55 – 59

The *lex specialis* provision of Article 55[27] is intended to apply to all the general rules on State responsibility contained in the preceding Parts One, Two, and Three. Moreover, the Commission noted that it is not the mere co-existence of specific rules with general rules, but the existence of specific rules to the exclusion of general rules, that triggers the application of the *lex specialis* provision. To clarify these points the Commission decided to explicitly include the headlines of Parts One, Two, and Three into the text of the article, and replace the word "determined" in last year's draft with "governed."

Article 56 had been provisionally adopted by the Drafting Committee last year as Article 33. The Commission believed that the provision was necessary because the draft articles might not cover all the consequences that may arise out of an internationally wrongful act, and the future development of the law should not be prejudiced. While Article 56 is most relevant in the context of Part Two, the Commission saw no reason to limit the application of the provision to this Part. Instead, Article 56 was redrafted more broadly to apply to the whole regime of State responsibility set out in the draft articles, and was grouped with Article 55 to which it is logically linked.

Article 57 was adopted substantially unchanged. Suggestions to phrase the article in more general language were rejected, so as to avoid unduly expanding the scope of the without-prejudice clause. It is the view of the Commission that when a State acts on behest of an international organization through organs which remain under its own authority and control, the conduct is that of the State. Such cases, thus, do not fall in the scope of the without-prejudice clause.

In Article 58, constituting a without-prejudice clause regarding individual responsibility, the reference to "agent of a State" was replaced with the formulation "acting on behalf of a State." The new formulation achieves systematic consistency with Part One, Chapter II, which does not develop the rules of attribution of conduct to a State on the basis of the concept of agency.

Article 59 emphasizes that the draft articles must be interpreted and applied in conformity with the Charter of the United Nations. While the Commission agreed that by virtue of Article 103 of the Charter such a provision was not strictly necessary, its inclusion was considered a useful expository reminder.

C. Form of the Draft Articles and Dispute Settlement

[26] Article 53 corresponds to Article 55 in last year's draft articles.
[27] Article 55 corresponds to Article 57 in last year's draft articles.

The question of the eventual form that the draft articles on State responsibility should take was controversial among Governments as well as in the Commission, and featured prominently in the Special Rapporteur's Fourth Report. Many Members favoured a convention, mainly because they believed that the importance of the topic would be underscored by the inclusion of the draft articles in a binding instrument. Moreover, members held that the example of the Vienna Convention on the Law of Treaties demonstrated the strong influence binding instruments could have on customary international law. Others advocated a non-treaty form, in order to immediately give universal effect to the provisions. Members were also concerned that the process leading to a convention could alter the balance and systematic coherence of the text.

The Commission finally agreed to recommend that the General Assembly take note of the draft articles and annex the text of the articles to this decision. In addition, the recommendation to the General Assembly indicates that the General Assembly might consider, at a later stage and in light of the importance of the topic, the possibility of convening an international conference to examine the draft articles on responsibility with a view to concluding a convention on the topic.

The question of whether the draft articles should elaborate a system of dispute settlement was considered to be closely linked to the issue of form. Most members believed that the inclusion of a dispute settlement machinery could only make sense in the context of a convention. Besides, the Commission considered that, even if the draft articles were to take the form of a binding instrument at a later stage, it remained rather questionable whether States would be willing to submit all disputes arising in a field as wide as State responsibility to a compulsory dispute settlement process. Consequently, the Commission decided not to include the former Part Three into the final draft articles.

III. International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (Prevention of Transboundary Harm from Hazardous Activities)[28]

[28] The "liability" topic originated from the Commission's discussions on State responsibility, particularly on draft Article 35 (now 27) of Part One. It was placed on the ILC's agenda in 1978, at which time Mr. Quentin-Baxter was appointed Special Rapporteur. Between 1980 and 1984, Mr. Quentin-Baxter submitted five reports. After his death, he was succeeded as Special Rapporteur by Mr. Julio Barboza, who provided the Commission with 12 reports between 1985 and 1996. From 1988 onwards these reports contained draft articles on various aspects of the topic. In 1992 the Commission established a Working Group to consider the scope of the topic, and, on the basis of its recommendations, decided in the same year to complete work on prevention of transboundary harm first and then to proceed with remedial measures. In 1994-5, the Commission at first reading provisionally adopted several draft articles. In 1996, a new Working Group was established, which, at the same session, submitted a report containing a complete picture of the topic, relating not only to the issue of prevention but also including liability for compensation or other relief, in the form of draft articles with commentaries (for the text see *International Law Commission, Report on the work of its fifty-third session, Official Records of the General Assembly,* fifty-first Session, Supplement No.10 (A/51/10), pp.235ff.).
In 1997, at its forty-ninth session, the Commission decided to divide the "liability" topic. Since the Commission thought that there was a need for substantial comments from Governments on the issue of liability, it decided to postpone consideration of that issue and meanwhile to concentrate on prevention, which was less contentious and which had already received considerable attention in the ILC. At the same session Mr. Pemmaraju Sreenivasa Rao was appointed as Special Rapporteur.
Mr. Rao's first report (A/CN.4/487 and Add.1), presented to the Commission in 1998, reviewed the work done by the ILC on the topic since 1978, focusing on the scope of the draft articles to be elaborated and on the analysis of a number of substantive and procedural obligations. Since the Commission already had before it the complete set of draft articles with commentaries on prevention provisionally adopted in 1996, Mr. Rao recommended that Commission review these articles as a starting point for its future work on the topic. Therefore, the Commission adopted at the first reading a set of 17 draft articles on Prevention of Transboundary Damage from Hazardous Activities (see *International Law Commission, Report on the work of its fiftieth session, Official Records of the General Assembly,* Fifty-third Session, Supplement No. 10 (A/53/10), pp.18ff.), and invited at the same time comments and observations by Governments. The articles were drawn from the text of the 1996 articles; however, the text was subjected to careful scrutiny resulting in a number of changes.
Mr. Rao's second report, presented at the fifty-first session in 1999 (A/CN.4/501), discussed the questions submitted to Governments and their reactions. The report also addressed the obligation of due diligence and

A. Introductory Remarks

The International Law Commission adopted nineteen draft articles with commentaries on "International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary harm from hazardous activities)." The articles comprise a set of primary rules which provide a framework for prevention of transboundary harm by requiring States to engage in cooperation and by laying a basis for States to avoid or settle disputes, balancing the interests of all involved. The focus is on risk management, due diligence, and prevention, emphasizing the obligation of States to consult with each other about the risk of transboundary harm at the earliest possible stage. By contrast, the articles do not grant a State likely to be affected the right to veto hazardous activities undertaken by another State.

The Commission was cautious to develop the present articles along the lines established by related international instruments, in particular the principles embodied in the Rio Declaration of 1992, the Stockholm Declaration of 1972, and the relevant provisions of the Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997.

The commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.

B. Consideration of the Draft Articles

Preamble

The set of draft articles on Prevention is introduced by a preamble, which is intended to spell out the central principles that project the balance-of-interest test applied all the way through the articles. These principles include the permanent sovereignty of States over natural resources on their territory, as well as the recognition that the freedom of States to permit activities on their territory is not unlimited. In this respect, reference to the Rio Declaration on Environment and Development of 13 June 1992 highlights the principles of precaution and sustainable development.

Article 1: Scope

Article 1 delimits the scope of the present draft articles on the basis of four criteria:

First of all, the articles refer to activities that are not prohibited by international law. This criterion has been introduced to separate the topic from that of State responsibility. It is not intended to exclude from the scope of the articles such activities that are prohibited by international law, but to emphasize that the obligation of prevention is owed irrespective of whether the activity is prohibited by international law *vel non*. This has two consequences: neither does the fact that an activity is contrary to international law liberate a State from its duty of prevention, nor does the invocation of the present articles presuppose that the activity in question is lawful.

Secondly, the articles are only applicable to transboundary harm. This criterion is elaborated in Article 2.

Thirdly, activities must involve a risk of causing significant transboundary harm, which, fourthly, only comprises harm that is caused by the physical consequences of an act. Thus, harm that may be caused by other than physical acts (e.g., monetary or socio-

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reviewed the treatment of the topic of liability in the work of the Commission. The Commission itself reviewed in 1999 three options for its future work and chose to finish prevention instead of terminating the work altogether or proceeding with work on liability.
At its fifty-second session in 2000, the Commission established a working group to discuss comments from Governments. One the basis of these discussions, the Special Rapporteur presented his third report (A/CN.4/516) containing a revised set of draft articles.

economic policies), as well as such harm where no causal link to an individual activity can be proved (e.g., decline of the ozone layer), are excluded from the scope of the articles.

Article 1 was adopted unchanged with regard to last year.

Article 2: Use of terms

Article 2 defines the concepts and terms central to the set of draft articles.

It is noteworthy that the Commission refrained from defining the concepts of risk and harm separately, because in the view of the Commission the focus should be on the combined effect of the probability of a risk to materialize and the magnitude of the harm caused by it. The expression “risk of causing significant transboundary harm” is deemed to comprise the whole spectrum of relationships between “risk” and “harm” that would reach the level of “significant”. Thus, activities involving a low probability of disastrous harm and a high probability of significant harm are comprised.

Moreover, Article 2 provides guidance to the interpretation of the notion of “transboundary harm”. Transboundary harm is conceived as harm caused in the territory of, or in places otherwise under the jurisdiction or control of, another State. Thus the Commission introduces territorial jurisdiction as the dominant criterion. The additional criterion of “control” over territory establishes a territorial link to a State where the latter does not exercise jurisdiction *de jure* but merely on a *de facto* basis (e.g., as regards unlawfully occupied territory).

Article 3: Prevention

Article 3 formulates the key obligation of prevention based on the fundamental principle *sic utere tuo ut alienum non laedas,* which is also reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. The obligation of prevention is essentially one of due diligence. Due diligence is perceived as the degree of care that is expected of a good government. In particular, it involves the existence of a legal system and sufficient resources to maintain adequate administrative control of hazardous activities. In order to comply with this obligation of due diligence, States may be obliged to, *inter alia*, adopt national legislation incorporating internationally recognized standards and resort to measures of abundant caution even if full scientific certainty may not (yet) exist (precautionary principle). In line with Principle 23 of the Stockholm declaration and Principle 11 of the Rio Declaration, the degree of care that is expected of a State is deemed to vary according to a country’s respective state of development.

Article 3 expresses priority in favour of the obligation of prevention over the secondary duty to minimize risks. To clarify this point the words “at any event” were added to the otherwise unchanged text.

Article 4: Cooperation

In accordance with Principle 24 of the Stockholm Declaration and Principle 7 of the Rio Declaration, Article 4 spells out the general obligation of States to cooperate in good faith, which extends to all phases of planning and implementation. Article 4 is complemented by the more specific obligations of cooperation that are spelled out in subsequent articles.

If necessary the States concerned shall seek the assistance of international organisations; this requirement may yield in cases where a State is technologically advanced enough, where there is no competent international organisation in place, or where the constitution of a competent international organisation does not allow assistance in the case in question.

Article 4 was slightly rephrased to reflect the primacy of prevention in accordance with Article 3.

Article 5: Implementation

The Commission included Article 5 to emphasize the continuing character of the obligation to take necessary measures of implementation, which might require renewed action to be taken when circumstances change.

Article 5 is not intended to preclude States from out-sourcing implementation to private entities.

Article 5 remained unchanged.

Article 6: Authorization[29]

This article formulates the fundamental principle that activities involving a risk of significant transboundary harm require the permission of a State's governmental authorities.

Accordingly, governmental authorization shall be required for all activities within the scope of Article 1, before such activity is carried out (Subparagraph (a)), whenever a major change in such activity might increase the risk or alter the nature of a risk (Subparagraph (b)), and whenever such change is planned (Subparagraph (c)).

Paragraph 2 extends the requirement of authorization to pre-existing activities within the scope of Article 1. A State may accord a reasonable period of time to the operators of such activities to comply with the terms of authorization after the State assumes the obligations spelled out in these articles.

Paragraph 3 relates to the consequences of the failure of an operator to comply with the terms of authorization. The paragraph leaves the State of origin with a high degree of discretion as to the means to ensure compliance by the operator, which may include, as appropriate, the termination of the authorization and the prohibition of the activity.

Article 6 was adopted with only minor changes for purposes of clarification in Paragraph 1 ("any activity" instead of "activities"; "any plan" instead of "a plan").

Article 7: Assessment of risk[30]

Article 7 reflects the current trend in international law, embodied, e.g., in Principle 17 of the Rio Declaration, of requiring an environmental impact assessment of any activity that might cause significant environmental harm. Impact assessment combines the precautionary principle with the principle of preventing environmental damage.

The requirement of impact assessment is applicable to new activities requiring prior authorization as well as to pre-existing continuing activities for which authorization has already been granted. As reflected by the words "in particular", risks of transboundary harm shall be prominently taken into account in the assessment.

The specific content of the impact assessment is left to domestic law.

Article 7 was slightly modified for clarification purposes.

Article 8: Notification and information[31]

Article 8 applies when the assessment undertaken by the State of origin does indicate a risk of significant transboundary harm. It provides for timely notification of the risk to the affected State by the State of origin, thus giving the States concerned a reasonable opportunity to undertake preventive measures. It includes activities planned not only by the State itself, but also by private entities. However, the information that must be transmitted is limited to technical and other information developed in relation to the activity, such as data and analysis.

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[29] Article 6 corresponds to Article 7 on first reading.
[30] Article 7 corresponds to Article 8 on first reading.
[31] Article 8 corresponds to Article 10 on first reading.

The Commission deleted the word "prior" from Paragraph 2 because it felt that inclusion of the word could cause problems in situations of authorization for a new or an ongoing activity. Additionally, the time limit for a decision on authorization of an activity was made more explicit, as the Commission changed it to the phrase "within a period not exceeding six months."

Article 9: Consultations on preventive measures[32]

Article 9 serves the purpose of promoting agreement on measures to prevent harm and minimize risk. The article provides that the States concerned consult and negotiate genuinely and in good faith in an attempt to reach an equitable solution concerning the risk, and applies to all issues related to preventive measures. It is not intended as a mere formality for the State of origin but neither is it intended as providing a right of veto to the affected State. As noted in the commentary, however, while the affected State does not ultimately have a veto right concerning the risky activities of the State of origin, the State of origin is still obligated to take the other's interests into account.

The Commission made minor drafting changes to this article, and also moved Paragraph 2 *bis* from Article 9 to Article 11 of the new draft.

Article 10: Factors involved in an equitable balance of interests[33]

Article 10 is intended to give guidance to States in coming to an equitable balance of interests in their consultations on preventive measures. The list of factors provided in the article as involved in this balance is non-exhaustive, and the Commission assigned no priority or weight to any of the factors. Subparagraph (a) involves both quantitative and qualitative comparisons of the degree of risk of significant transboundary harm to the availability of means to prevent or repair that harm, respectively minimizing the risk thereof. Subparagraph (b) takes into account the importance of the activity in terms of its social, economic, and technical advantages. Subparagraph (c) involves elements of the precautionary principle as it appeared in Principle 15 of the Rio Declaration, while Subparagraph (d) involves the "polluter-pays" concept of Rio Principle 16. The term "as appropriate" in Subparagraph (d) indicates that the contribution to costs of prevention by the affected State is not expected to be at the same level as that of the State of origin in all circumstances. Subparagraphs (e) and (f) both take account of a State's economic situation vis-à-vis its ability to prevent transboundary harm.

There are no major drafting changes in this article.

Article 11: Procedures in the absence of notification[34]

Article 11 deals with procedures involved in the absence of notification by a State of origin of a risk of transboundary harm. It covers situations where a potentially affected State believes it is at risk but has received no notification of any activity from the State of origin. Invocation of this article, however, does not automatically mean that the State of origin has failed to fulfil its article 8 obligations. The article necessitates a serious and substantial belief on the part of the potentially affected State that a risk does exist; the grounds for this belief must be reasonable and documented. If the belief of a potentially affected State meets these requirements, the State of origin may have to alter or suspend its activities for a reasonable period of time if the other State requests it to do so. All of these transactions are to take place in the context of consultations between the States.

The Commission made a few drafting changes in this article. First, it changed the phrase "have a risk" to "involve a risk" for the sake of consistency with Article 1. In Paragraph

[32] Article 9 corresponds to Article 11 on first reading.
[33] Article 10 corresponds to Article 12 on first reading.
[34] Article 11 corresponds to Article 13 on first reading.

1, the words "to it" were added after the phrase "risk of causing significant transboundary harm" in order to make clear that only the State actually at risk could request the application of Article 8. Finally, the Commission moved Paragraph 3 back to this article from Article 9, Paragraph 2 *bis*.

Article 12: Exchange of information[35]

Article 12 provides that the obligation of due diligence continues throughout the potentially risky activity and afterwards. The Commission inserted the phrase "concerning that activity" after "all available information" to clarify the link between the information to be exchanged and the activity. More importantly, it added a second sentence at the end of the article: "Such an exchange of information shall continue until such time as States concerned consider it appropriate even after the activity is terminated." This sentence is meant to ensure that the information will be exchanged not only while an activity is being carried out but also after the activity has ceased. This takes account of the fact that the consequences of some activities might still pose a significant risk of transboundary harm even after termination of the activity (e.g., nuclear activity that generates nuclear waste).

Article 13: Information to the public[36]

Article 13 reflects the trend in international law to involve the public affected by governmental decisions in the decision-making process, as exemplified by Principle 10 of the Rio Declaration, Article VII of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, and numerous other conventions. Its purpose is to allow the public to inform themselves and, most importantly, to encourage Governments to ascertain their views. The article leaves the ways in which information is to be provided to the public in the hands of the States, so that the States can adopt practices that reflect their domestic law requirements, media situation, and so on. However, the article intends that the affected State should inform its public *before* responding to the notification. No changes were made to this article except to alter its position to follow Article 12, which was felt to be more logical.

Article 14: National security and industrial secrets[37]

This article establishes a narrow exception to the obligations of States under Articles 8, 12, and 13, providing that States may withhold certain types of sensitive information. The Commission included both "intellectual property" and "industrial secrets" as privileged information, as members felt that "industrial secrets" alone was not sufficiently broad. However, this exception is to be employed in good faith and in a spirit of cooperation among the parties. It is similar to Article 31 of the Convention on the Law of the Non-navigational Uses of International Watercourses, and was well received by governments.

The Commission made only minor drafting changes.

Article 15: Non-discrimination[38]

This article makes it clear that the State of origin must grant access to its judicial and other procedures to those affected by its activities, without discrimination on the basis of nationality, residence, or the place where the injury might occur. It is based on Article 32 of the Watercourses Convention, and provides that a State of origin must afford all persons the same treatment it affords to its own nationals in cases of potential domestic harm. This article is especially important in that it makes it impossible for a State to bar a claim on the grounds that the actual harm occurred outside of the State's jurisdiction. While the article recognizes

[35] Article12 corresponds to Article 14 on first reading.
[36] Article 13 corresponds to Article 9 on first reading.
[37] Article 14 corresponds to Article 15 on first reading.
[38] Article 15 corresponds to Article 16 on first reading.

that States may make agreements between themselves as to how to handle cases of harm to each other's citizens, it also requires that these bilateral or multilateral agreements always have at their core the protection of the interests of affected persons (e.g., States may not agree amongst themselves to bar all claims of injured persons). However, this article does not affect the practice of some States of requiring that non-residents or aliens post a bond to cover court fees, as taken into account by the phrase "in accordance with its legal system."

Only minor drafting changes were made in this article.

Article 16: Emergency preparedness

This article did not appear in the first reading, but is based on Article 28 of the Watercourses Convention and has appeared in previous drafts, since which time it has received only minor drafting changes. It takes into account the fact that the scenarios of transboundary harm anticipated in the draft could include situations of emergency, and provides that States must take anticipatory, not just responsive, action. The article places the primary responsibility for contingency plans on the State of origin, but also suggests that these plans be developed in cooperation with potentially affected States and with relevant international organizations.

Article 17: Notification of an emergency

As was the case with Article 16, this article made its appearance after the first reading. It is based on Article 28 of the Watercourses Convention and Principle 18 of the Rio Declaration. The article is linked with Article 16 in that, if an emergency does occur, the State of origin has the further obligation of notifying the potentially affected State as expeditiously as possible and providing it with the relevant information. There was some feeling in the Commission that this provision should be noted as subject to article 14 provisions on national secrets. Aside from slight linguistic changes, however, there were only two major changes. First, the word "available" after the phrase "expeditious means" was replaced by "at its disposal," to reflect potential differences in each State's level of development. Second, the phrase "and provide it with all relevant and available information" was included at the end of the paragraph to ensure that the affected State was kept informed of the facts concerning the emergency.

Article 18: Relationship to other rules of international law[39]

This article clarifies the fact that the articles on prevention of transboundary harm are without prejudice to any other obligations a State may have under international law. The Commission felt it did not need to explain in this article whether the draft represented a framework or traditional convention. The Commission made a major change to the original opening phrase: "obligations arising from the present draft articles" became "the present articles." This change reflected the opinion of the Commission that the original wording could be interpreted too narrowly, as it spoke only of obligations. The new wording was felt to be less restrictive.

Article 19: Settlement of disputes[40]

Since the first reading the procedure for dispute settlement has undergone major changes. The original draft required full cooperation of all the parties to a dispute in order for the dispute settlement mechanism to operate. The Commission had doubts about the effectiveness of such a mechanism, and established a new method to provide recourse to a fact-finding commission when cooperation among the parties could not be achieved. This

[39] Article 18 corresponds to Article 6 on first reading.
[40] Article 19 corresponds to Article 17 on first reading.

new mechanism is based on that of Article 33 of the Watercourses Convention, which had been extensively negotiated and ultimately accepted by States.

This article applies only to those situations where the States concerned do not already have an applicable agreement on dispute settlement procedures, and where they have exhausted all other means of persuasion. The term "mutual agreement" in Paragraph 1 refers to modes of settlement previously agreed to by States. Paragraph 1 also provides that States must settle disputes through peaceful means of their own choosing; the means listed as examples in the paragraph are non-exhaustive. There were only minor changes to this paragraph.

Paragraph 2 introduces the fact-finding commission as a minimum procedure for the settlement of a dispute when the parties have not agreed on a means of settlement within six months. The establishment of a fact-finding commission reflects the view of the Commission that it is the lack of proper appreciation of the correct and relevant facts that is often at the root of disputes among States. This paragraph is substantially similar to that of last year's draft articles, except that the Commission eliminated the sentence, "the report of the commission shall be considered by the parties in good faith," from the end of the paragraph, as this issue is dealt with in Paragraph 6.

Paragraphs 3, 4, 5, and 6 are all new additions to the article, and flesh out the details of the fact-finding commission. Paragraph 3 provides that each party nominates a member of the commission, and that these members then agree on a chairperson. Paragraph 4 reflects the need for impartiality and a balance of interests in the commission, so that the commission can command the confidence of the parties involved. To achieve this balance, the State of origin is allowed a number of representatives equal to the total number of representatives of the States likely to be affected. Paragraph 5 designates the Secretary-General of the United Nations as the person to appoint members of the fact-finding commission when the parties cannot agree on, or do not nominate, a member. Finally, Paragraph 6 provides that the commission adopt its report by a majority vote and submit that report to the parties, who then must consider it in good faith.

IV. Reservations to Treaties[41]

A. Introductory Remarks

The ultimate goal of the ILC project on reservations to treaties is to produce a Guide to Practice relating to the legal regime of reservations and interpretative declarations. At its

[41] In its Resolution 48/31 of 9 December 1993, the General Assembly endorsed the decision of the International Law Commission to include in its agenda the topic “The law and practice relating to reservations to treaties.” At its forty-seventh session in 1995, the Commission, after discussing the first report of Special Rapporteur, Professor Alain Pellet (A/CN.4/470 and Corr.1), determined that work on this topic should result in a Guide to Practice that would supplement the relevant provisions of the 1969, 1978, and 1986 Vienna Conventions on the Law of Treaties. In 1997, following debate on the Special Rapporteur’s second report (A/CN.4/477 and Add.1), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. At its fiftieth session (1998), the Commission had before it the Special Rapporteur’s third report, which dealt with definitions of reservations and interpretative declarations. The Commission considered part of the report and referred eleven draft guidelines to the Drafting Committee. On the recommendation of the Drafting Committee, the Commission provisionally adopted six additional draft guidelines, along with commentaries to accompany all the draft guidelines adopted. At its fifty-first session (1999), the Commission again had before it that part of the Special Rapporteur’s third report that it had been unable to consider at the fiftieth session, and the Special Rapporteur’s fourth report, which continued to deal with the definition of reservations and interpretative declarations. The Commission referred eleven draft guidelines to the Drafting Committee. On the recommendation of the Drafting Committee, the Commission adopted on first reading seventeen of the proposed draft guidelines and a new version of two previously adopted draft guidelines. At its fifty-second session (2000), the Commission considered Professor Pellet’s fifth report (A/CN.4/508) together with four addenda (Add. 1-4). Several draft guidelines were revised and adopted by the Drafting Committee.

fifty-third session, the ILC considered Special Rapporteur Alain Pellet's fifth[42] and sixth reports.[43]

The outstanding issues from the fifth report which the Commission dealt with in the fifty-third session were the procedures for formulating, modifying, and withdrawing reservations and interpretative declarations. The Commission ultimately adopted a set of twelve draft articles related to these issues.[44]

The sixth report reviews the earlier work of the Commission, taking into account the consideration of the topic in the Sixth Committee. Moreover, the report discusses the communication between the Special Rapporteur and the Sub-commission on the Promotion and Protection of Human Rights[45] and the Committee on the Elimination of Discrimination Against Women[46] on the topic of reservations to human rights treaties. Over the course of the session the Special Rapporteur presented three addenda to the sixth report. Addenda 1 and 2 deal with modalities of formulating reservations and interpretative declarations, specifically the form and notification of reservations and interpretative declarations and the publicity of reservations and interpretative declarations. The draft guidelines contained in these addenda were discussed by the Commission and then referred to the Drafting Committee. Addendum 3 contains the consolidated text of all draft guidelines dealing with the formulation of reservations and interpretative declarations proposed in the fifth and sixth reports.

B. Consideration of the Draft Guidelines in the Fifth Report

With regard to the fifth report, the Commission focused on three procedural aspects of reservations and interpretative declarations: confirmation of reservations made when signing, late formulation of reservations, and procedures regarding interpretative declarations.

Confirmation of reservations made when signing: Guidelines 2.2.1, 2.2.2 and 2.2.3

Considerable debate centred on the possible merger of Guidelines 2.2.1 and 2.2.2. In the end, the inclusion of Guideline 2.2.2 in Guideline 2.2.1 was rejected for reasons of clarity. In addition, several members took issue with the inclusion of the word "negotiating" within proposed Guideline 2.2.2, arguing that a reservation could only be formulated once there was an established text. While retaining Guideline 2.2.1 with only minor changes,[47] the Commission ultimately eliminated proposed Guideline 2.2.2.

Former Guideline 2.2.3 was accordingly renumbered as Guideline 2.2.2 and revised to emphasize that subsequent confirmation is not required in the particular case where a treaty provides that signature alone is sufficient to express consent to be bound.[48] The Commission also decided to retain the Special Rapporteur's proposal in Guideline 2.2.3[49] that formal confirmation is not required for reservations formulated upon signature when a treaty expressly so provides.

Late formulation of reservations: Guidelines 2.3.1, 2.3.2, 2.3.3, and 2.3.4

The question whether the Guide to Practice should include *any* reference to late reservations was subject to heated debate. Several members were of the opinion that late

[42] A/CN.4/508 and Add.1-4.
[43] A/CN.4/518 and Add. 1-3.
[44] Contained in A/CN.4/603 and Corr. 1–2.
[45] Sixth report, paras 20–27.
[46] Sixth report, para 28.
[47] The title was revised as "Formal confirmation of reservations formulated when signing a treaty" and "the treaty" was changed to "a treaty" in the first sentence of the text.
[48] The phrasing of the draft guideline was significantly revised and "Instances of" was added to the title to distinguish the particular nature of this case as compared with the case dealt with in draft guideline 2.2.3.
[49] Guideline 2.2.3 corresponds to 2.2.4 as proposed by the Special Rapporteur.

reservations were a deplorable practice and the Commission should not be seen as condoning it. At the same time, despite the undesirability of late reservations in principle, it was also recognized that States use them in practice and thus the best course was include reference to late reservations in the Guide to Practice subject to strict limitations. Ultimately, the Commission adopted the draft guidelines on first reading with the understanding that these issues will be revisited in the future.

The Commission adopted Guidelines 2.3.1, 2.3.2, 2.3.3, and 2.3.4 in substantially the proposed form. Guideline 2.3.1 narrows down the use of late reservations by requiring, in the absence of express authorization of late reservations in the treaty, the *unanimous* consent of the other contracting Parties, in the sense of absence of objections. Guideline 2.3.2 prescribes a 12-month period for contracting Parties to express objections to late reservations, unless a provision in the treaty or the well-established practice of the depositary provide otherwise. Guideline 2.3.3 emphasizes that an objection by one contracting Party is sufficient to preclude a late reservation from taking effect. Guideline 2.3.4 precludes the subsequent exclusion or modification of the legal effects of a treaty by means other than reservations.

Procedures regarding interpretative declarations: Guidelines 2.4.3, 2.4.4, 2.4.5, 2.4.6, and 2.4.7

As to the specific case of conditional interpretative declarations, several members expressed difficulties with the inclusion of this practice in the Guide at all and reiterated that the topic would have to be revisited in future sessions before the Commission reached a final decision.

Concerning “simple” interpretative declarations and following debate whether it was appropriate to mention the time at which such declarations may be formulated, the Commission concluded that the formulation of rules in the context of the Guide to Practice presupposed that States and international organizations could base themselves on these rules only if the treaty did not contain contrary provisions. Thus, the bracketed language in proposed Guideline 2.4.3 was deleted and the revised text simply reads that interpretative declarations “may be formulated at any time.”

The Commission decided to expand the scope of Guideline 2.4.4, which had orignially provided an exception to the requirement of confirmation of interpretative declarations only for treaties that enter into force upon signature. The Commission considered it appropriate to make the provision applicable to all treaties by using the broader wording “a treaty.“ In light of the decision to expand the scope of Guideline 2.4.4, Guideline 2.4.6 concerning interpretative declarations for which the treaty makes express provision was deemed unnecessary.

In view of the deletion of the 2.2.2, the Commission also eliminated the corresponding language from Guideline 2.4.5[50] regarding conditional interpretative declarations formulated when negotiating, adopting and authenticating the text of a treaty.

Guidelines 2.4.6[51] and 2.4.7[52] regarding late formulation of interpretative declarations and conditional interpretative declarations were adopted on first reading with minor revisions to the text.

C. Consideration of the Draft Guidelines in the Sixth Report

The draft guidelines in the sixth report are grouped into two categories: form and notification of reservations and interpretative declarations and publicity of reservations and interpretative declarations.[53]

[50] Guideline 2.4.5 corresponds to Guideline 2.4.4 as proposed by the Special Rapporteur.
[51] Guideline 2.4.6 corresponds to Guideline 2.4.7 as proposed by the Special Rapporteur.
[52] Guideline 2.4.7 corresponds to Guideline 2.4.8 as proposed by the Special Rapporteur.

Form and notification of reservations and interpretative declarations: Guidelines 2.1.1, 2.1.2, 2.1.3, 2.1.3 (bis), 2.1.4, 2.4.1, 2.4.1 (bis), and 2.4.2

Guidelines 2.1.1 and 2.1.2 deal with the basic requirements for the formulation of a reservation. Guideline 2.1.1 clarifies that a reservation must be formulated in writing. Guideline 2.1.2 provides that when formal confirmation of a reservation is necessary, it must also be made in writing. The Commission felt that it was better to leave the guidelines vague on the issue of oral reservations: though there was consent that reservations could be made orally, some members felt that an oral reservation was only acceptable when that reservation was *confirmed* formally—that is, in writing—at the moment of final expression of consent to be bound.

The procedure of formulating a reservation is taken up in draft guidelines 2.1.3, 2.1.3 *bis*, and 2.1.4. Guideline 2.1.3 deals with the question of who may formulate a reservation on behalf of a State or international organization. Most members felt that competence to formulate a reservation should be limited only to those persons or organs that are competent to express consent to be bound to the treaty itself. Of the two versions of this guideline offered by the Special Rapporteur, the majority of members preferred the lengthier version, which incorporates the text of Article 7 of the 1986 Vienna Convention. However, members felt it would be best to do away with paragraph (d) of the long version.

Guideline 2.1.3 *bis* provides for the determination of the competence to formulate a reservation at the internal level. However, most members felt that this guideline should be deleted, as it dealt with internal legislation and was implicit in Guideline 2.1.4, which provides that a violation of internal rules on the formulation of a reservation has no effect on that reservation's validity. The appropriateness of the word “invalidating” was also questioned, because from the perspective of international law, a State is always free to withdraw a reservation that was made in violation of internal rules. In general, the Commission felt that this guideline was unnecessary, and that it may be more useful instead to focus on the competence to accept or object *to* reservations.

The formal-procedural aspects of interpretative declarations, both simple and conditional, are discussed in draft guidelines 2.4.1, 2.4.1 *bis*, and 2.4.2. Guideline 2.4.1 deals with competence to formulate simple interpretative declarations. Since, simple interpretative declarations have as their sole object the clarification of the scope or meaning that their author gives to the treaty, and do not change the obligations or rights of the author, there are no formal requirements for them. Guideline 2.4.1 *bis* discusses the application of internal rules to the formulation of an interpretative declaration. As was the case with Guideline 2.1.3 *bis*, most members felt this guideline was unnecessary. Finally, Guideline 2.4.2 requires conditional interpretative declarations to be in writing. The Commission endorsed this guideline, since it was regarded as essential that other parties be aware of an interpretative declaration of this nature so that they have an opportunity to oppose it.

Publicity of reservations and interpretative declarations: Guidelines 2.1.5, 2.1.6, 2.1.7, 2.1.8, 2.4.2, and 2.4.9

Guideline 2.1.5 adopts the wording of Article 23(1) of the 1986 Vienna Convention, adding the further requirement that the reservation must be communicated in writing.[54]

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[53] Regarding conditional interpretative declarations, the Special Rapporteur felt that the Commission should wait until it has dealt with the effects of reservations to take a final position on formal requirements for such declarations. Several members wanted to make it clear that while they were acceding to the Special Rapporteur’s request to delay debate, their silence did not mean that they agreed to treatment of such declarations in the Guide to Practice in the first place.

[54] Since Article 23(1) requires that reservations be formulated in writing and links that condition to the requirement that reservations be communicated, this additional wording merely makes explicit the implicit requirement in the Vienna Convention.

Guideline 2.1.5 also requires that reservations to constituent instruments of an international organization or deliberative organ be communicated to that organization or organ.[55]

Debate focused on three related issues. First, the Commission wondered whether there was any way to clarify which States or international organizations are capable of becoming Parties. Members generally considered that such further specification of the definition would not be useful.

Second, the question was raised whether deliberative organs and preparatory committees should be included in the list of required addressees. Members pointed out that there was uncertainty as to which deliberative organs are considered international organizations. A suggestion was made to change the term "deliberative organ" to "competent body," because it was the competency that is the crucial factor in determining whether the body should be the addressee of communications on reservations.[56] As to preparatory committees, the general consensus was that they should not be included in the list of addressees.

Finally, the question was addressed whether a reservation sent to an international organization, dealing with the constituent instrument of that organization, should also be sent to the member States of the organization. The opinion was expressed, without objection, that such reservations should be communicated to the member States as well.

Guideline 2.1.6 reproduces and adapts to reservations Article 78(a) of the 1986 Vienna Convention. It also suggests a rule for dealing with the electronic communication of reservations, through either electronic mail or facsimile. The Commission concluded that all electronic communications should be confirmed by regular post.

With regard to Guideline 2.1.7, debate focused on whether the depositary could reject reservations to treaties that specifically prohibited reservations. Several members felt that the depositary could be given such power only in cases where a treaty prohibits a reservation (Article 19(a) and (b) of the Vienna Convention) and not in cases where the depositary might feel that the reservation violated the "object and purpose" of a treaty (Article 19(c) of the Vienna Convention). It was agreed that if the depositary were to exercise such a power there must be a *prima facie* prohibition of reservations or reservations of that type in the treaty.[57]

Guideline 2.1.8 is modelled after Article 79(b) of the 1986 Vienna Convention. However, one member pointed out that the latter part of Article 79(b), according to which a reservation is deemed to be made at the time of reception by the depositary, was omitted. It was discussed whether, in case of transmission to a depositary, the reservation should be considered "received" by the State or organization in question only when it has been informed by the depositary,[58] or as suggested by one member, when the depositary receives the reservation. Knowledge of the date of receipt is crucial, because the time period during which a State can object to a reservation only begins to run from the time that the reservation has been received.[59] Moreover, the distinction between "received" and "made" can be important in establishing whether a reservation is late or not. The Commission noted that the proposal to consider a reservation received upon reception by the depositary would certainly solve the discrepancy between the date when a reservation is made and the date when it is received. On the other hand, it might deprive States of valuable time to object and may prove contrary to Article 79(c) of the 1986 Vienna Convention.

Guideline 2.4.2 applies *mutatis mutandis* the rules for reservations embodied in Guideline 2.1.5 to conditional interpretative declarations, while Guideline 2.4.9 applies all the guidelines dealing specifically with publicity of reservations to these same acts. Despite the focus on conditional interpretative declarations, debate concentrated on the communication

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[55] This provision is based on Article 20(3) of the 1986 Vienna Convention and on the practice of the UN Secretary General as a depositary.

[56] This change would reflect Article 20(3) of the Vienna Convention.

[57] Article 120 of the Rome Statute of the International Criminal Court, 17 July 1998 (A/CONF.183/9) was given as an example of a *prima facie* prohibition.

[58] In accordance with Article 79(c) of the 1986 Vienna Convention.

[59] Cf. Article 20(5) of the Vienna Convention.

of simple interpretative declarations to a depositary. In accordance with the principles embodied in Article 31 of the Vienna Convention, for any interpretative declaration to take legal effect that declaration has to be communicated to the other contracting Parties.[60] The Commission concluded therefore, that if a depositary was notified of a simple interpretative declaration, the depositary would have to communicate that declaration under the procedures applicable to reservations and conditional interpretative declarations.

D. Future Work

The draft guidelines proposed in the sixth report, i.e. those on the modalities of formulating reservations and interpretative declarations and on the publicity of reservations and interpretative declarations, were forwarded to the Drafting Committee for consideration at the next session. The Special Rapporteur intends to move forward to the topics of modification and withdrawal of reservations and interpretative declarations as well as the issue of acceptance of or objection to reservations and interpretative declarations.

The question was raised how to integrate reservations to human rights treaties into the larger project on reservations as a whole. There was no consensus reached on whether the Commission should pursue a wait-and-see or a proactive approach in this regard.

V. Diplomatic Protection[61]

A. Introductory Remarks

In 2001, debate in the Commission focused on two issues: the rule of continuous nationality and the rule of exhaustion of local remedies. Discussion of the rule of continuous nationality was based on draft article 9 proposed in addendum 1 to the first report presented by the Special Rapporteur, John Dugard, last year.[62] As to the rule of exhaustion of local remedies, the Special Rapporteur proposed a set of four draft articles in his second report of 2001.[63]

The Commission came to the conclusion that draft Article 9 ought to be entirely reformulated so as to maintain the traditional rule of continuous nationality while providing for certain exceptions. Draft Articles 10 and 11, regarding the exhaustion of local remedies, were relatively less controversial, although some changes were suggested. All three articles were referred to the Drafting Committee. The Commission deferred consideration of draft Articles 12 and 13, also contained in the second report, to next year's session. No progress was

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[60] This principle is derived from Article 31 of the Vienna Convention.

[61] At its forty-eighth session (1996), the I.L.C. proposed the topic of diplomatic protection for codification and progressive development *(Official Records of the General Assembly, Fifty-first Session*, Supplement No. 10 (A/51/10), para 249). That same year, the UN General Assembly invited the Commission to discuss the topic and to indicate its future direction (Resolution 51/160 of December 16, 1996). In 1997, the Commission appointed Mr. Mohamed Bennouna as Special Rapporteur on the topic. In Resolution 52/156 of December 15, 1997, the General Assembly endorsed the Commission's decision to include the topic on its agenda.

In 1998, the Commission considered Special Rapporteur Bennouna's preliminary report on the topic (A/CN.4/484). It then established a Working Group to consider approaches to the topic, given the conclusions and questions raised in the report. The Commission approved the recommendations of the Working Group. After Mr. Bennouna had resigned from the Commission, in 1999 the Commission appointed Mr. Christopher J. R. Dugard as Special Rapporteur for the subject and considered the topic in an informal working group. At its fifty-second session, in 2000, the Commission considered Mr. Dugard's first report (A/CN.4/506). The report proposed eight draft articles, six of which were submitted to the Drafting Committee, namely draft Articles 1 (describing the scope of the topic), 3 (respecting the discretionary nature of the State's right to exercise protection), 5 (regarding the meaning of "national" and the means naturalization), 6 (regarding the principle of "effective" nationality), 7 (addressing the circumstance of dual nationality), and 8 (on the protection of stateless and refugee residents). No action was taken on draft Articles 2 (dealing with cases of the threat or use of force in the protection of nationals) and 4 (formulating a legal duty to exercise diplomatic protection for grave breaches of a *ius cogens* norm).

[62] A/CN.4/506/Add.1.

[63] A/CN.4/514; for the text of the draft articles actually discussed this year, see the following footnotes.

made on draft Articles 1, 3, and 5 to 8 of the first report, which had been discussed in plenary and sent to the Drafting Committee during the fifty-second session (2000).

B. Consideration of the Draft Articles

Nationality of claims: Article 9[64]

The traditional rule allows States to present a claim on behalf of an individual only under the condition that the individual has held the nationality of the claimant State continuously from the time of injury to the time a claim is presented. This rule of continuous nationality found its judicial expression notably in the *Mavrommatis* case. Draft Article 9 as it was proposed by the Special Rapporteur attempted to break away from this rule and sparked considerable debate. The Special Rapporteur questioned the continued viability of the traditional rule, in light of the recognition of a growing number of exceptions in recent jurisprudence and a trend in international law toward the recognition of individual rights.

While some members considered the "flexible regime" proposed by the Special Rapporteur to be a substantial step forward, the Commission generally felt that the rule of continuous nationality constituted a well-established rule of customary international law which was generally accepted in State practice and recognized in numerous decisions of international tribunals. It was suggested that at least some proof of the emergence of a new rule should be evident before the classical concept could be discarded wholesale. Most members found such evidence to be lacking. However, it was equally agreed that a number of exceptions to the classical concept should be recognized to take account of situations where the individual would otherwise have no possibility to obtain diplomatic protection by any State.

The Commission consequently attempted to identify possible exceptions to the rule of continuous nationality: changes of nationality due to State succession, marriage, inheritance, subrogation, and adoption.

Many members favoured a distinction between voluntary and involuntary changes of nationality. In the case of involuntary changes, the rationale of the rule of continuous nationality to avoid abuses of diplomatic protection by way of 'claim shopping' would not apply. Members, however, pointed out that it might be difficult draw a sharp distinction between these two categories. For instance, while a change in nationality due to State succession would clearly be involuntary, other cases, such as a change of nationality due to marriage, were more difficult to categorize.

In the alternative, a distinction was proposed between a change in nationality brought about by the disappearance of a State on one hand, and that caused by a change in individual status on the other.

Moreover, the concept of *bona fide* change of nationality, contained in paragraph 1 of the draft Article, raised questions. Members expressed their doubts on the practical applicability of a criterion as subjective as good faith. Further, it was noted that the criterion of good faith presented particular problems in the case of legal persons, where the danger of

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[64] Article 9

1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury,
provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.
2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.
3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its
general interests suffered through harm done to the injured person while he or she was still a national of that State.
4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.

"claim shopping" may be most prevalent. Therefore, many members suggested that the criterion of an effective link developed in the *Nottebohm* case should replace the proposed requirement of *bona fide* change of nationality.

The Commission felt that paragraph 2, dealing with the transferability of claims, required further consideration, since State practice on the matter was inconclusive. In particular, the desirability of permitting the sale of claims was considered to raise many difficult questions.

By contrast, Paragraph 3, which reaffirms a State's right to bring a claim on its own behalf, was regarded as superfluous, because such cases would by definition fall under the scope of the draft Articles on the State responsibility and outside that of diplomatic protection. Paragraph 4, according to which the new State of nationality is barred from the initiation of claims against the State of nationality at the time of injury, was generally endorsed.

Finally, the Commission accepted the Special Rapporteur's proposal to submit a new draft of Article 9, formulated in terms of the general rule and providing for reasonable exceptions, to the Drafting Committee at the Commission's fifty-forth session. Possible formulations of the new draft Article were considered during informal consultations.

Exhaustion of local remedies: Articles 10 and 11[65]

The rule of exhaustion of local remedies is generally recognized as an important principle of customary international law. In the context of diplomatic protection, the principle of respect for the sovereignty and jurisdiction of the State alleged to be responsible for the injury requires that remedies under the jurisdiction of that State be sought in vain before a claim under diplomatic protection may be instituted on the international level.

Article 10 lays out the general principle that a national must exhaust all available local legal remedies in the State alleged to be responsible for the injury. As defined by Paragraph 2, local legal remedies comprise such remedies which are granted as of right before judicial or administrative courts and authorities.

Generally, the Commission supported the proposal to follow the distinction between primary and secondary rules developed in the draft articles on State responsibility. Accordingly, the draft articles on diplomatic protection should limit their scope to secondary rules. Thus, the Commission should attempt to define the contents of the rule of exhaustion of local remedies without describing the range of internationally wrongful acts to which the rule applies. However, some members felt that this distinction could not be maintained too rigidly in the context of the present article, because the concept of denial of justice was so intimately connected with the rule of exhaustion of local remedies that reference to primary rules was inevitable.

In this context, the Special Rapporteur sought direction from the Commission as to whether the concept of denial of justice should be taken up and elaborated upon in the draft. While members from Latin American countries generally favoured the formulation of a standard of denial of justice, the majority of members pointed out that, even if the failure to

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[65] Article 10

1. A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, before the injured national has, subject to Article 15, exhausted all available local legal remedies in the State alleged to be responsible for the injury.

2. "Local legal remedies" means the remedies which are as of right open to natural or legal persons before judicial or administrative courts or authorities whether ordinary or special.

Article 11

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national and where the legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]

provide the necessary local remedies can amount to denial of justice, the exhaustion of local remedies is nonetheless distinct from that issue.

A number of members proposed to explicitly include the criterion of effectiveness of the local remedy referred to in draft article 10, especially in light of the reference to "effective local remedies" in Article 44 of the draft articles on State responsibility.[66] Thus, only such remedies that are available and effective should qualify as local remedies under the present draft articles. The requirement of the "legal" nature of the remedy was considered a mere surplusage by some members, but was retained for clarification purposes.

The Commission reaffirmed its view that Article 10 was equally applicable to natural and legal persons. In light of the Commission's previous agreement to first draft a set of articles applicable to both and natural and legal persons and subsequently include a separate chapter on exceptions for legal persons, explicit reference in the text of Article 10 to natural and legal persons was considered superfluous.

In response to a misleading formulation in Paragraph 14 of the Special Rapporteur's second report, the Commission emphasized that administrative remedies should not be restricted to administrative tribunals but comprise all remedies before State authorities open to the individual as of right.

Some controversy was stirred in the Commission by the proposal of the Special Rapporteur to indicate in the commentary that the foreign litigant must raise in the municipal proceedings all the arguments he intends to raise in international proceedings.

Some members argued that such a rule failed to take into account that domestic and international jurisdictions required the presentation of different arguments, because specific arguments would only be relevant to international law. Certain treatment of an individual by a State organ may well be in accordance with the State's internal law but in violation of international law. Therefore, it may not be appropriate to formulate a rule that would bar the State of nationality from presenting an argument on behalf of the individual in an international claim on the grounds that such an argument has not been advanced during domestic proceedings.

Furthermore, members drew the attention of the Commission to certain issues that required elaboration in the commentary: these issues included definitions of "quasi-judicial" and "legal" remedies as well as the question whether resort to international institutions that are open to the individual as of right (e.g., the Strasbourg system), or resort to an "Ombudsman" could constitute a local remedy within the meaning of the draft articles.

Article 11 limits the requirement of the exhaustion of local remedies to such cases where an international claim is preponderantly brought on the basis of an injury to a national. As an alternative to the criterion of preponderance the so-called *sine qua non* test was suggested, according to which the rule of the exhaustion of local remedies would apply in situations where a State would not have presented a claim but for the injury to the individual. While on the whole the view was prevailing that Article 11 accurately reflected State practice, certain issues were considered to require further reflection.

Some members, regarded the article as unnecessary for systematic reasons. Since the present draft articles limited their scope to diplomatic protection, defined as the presentation of a claim by a State on behalf of its national, the presentation of a State's own claim would not fall under the present articles and therefore not be subject to the rule of exhaustion of local remedies. The majority of members, however, found the retention of the article useful. Some members did raise concerns, however, that the preponderance test, just as any other test alternatively suggested by the Special Rapporteur in the second report, might be difficult to apply in practice.

Some members questioned whether the terminology of direct and indirect claims used in the second report adequately reflected the distinction between State claims and

[66] Cf. Annex I to the present paper.

claims brought on behalf of the individual. Instead, it was proposed to speak of "immediate" and "mediate" claims.

The Special Rapporteur had requested the view of the Commission whether Article 11 should enumerate certain specific criteria (included into the proposed draft article in square brackets) to determine whether a claim is preponderantly based on the injury of a national. Some members supported the inclusion of such criteria under the condition that they formed part of the rule and were not simply enlisted as examples. Yet, the majority of the Commission favoured the deletion of specific criteria in Article 11, thereby not excluding the option of identifying certain criteria in the commentaries at a later stage.

Finally, the Commission referred Articles 10 and 11 to the Drafting Committee.

C. Future Work

The Drafting Committee will be debating Articles 1, 3, and 5 – 11. Furthermore, the Special Rapporteur announced his intention to cover the rules of diplomatic protection of legal persons in forthcoming reports.

VI. Unilateral Acts of States[67]

A. Introductory Remarks

The Special Rapporteur, Victor Rodriguez-Cedeño, introduced his fourth report on Unilateral acts of States, which addresses the classification of such acts and presents draft Articles (a) and (b) on general rules of interpretation.[68] No further action was taken with regard to the draft articles submitted in the Special Rapporteur's third report of last year. However, a Working Group on Unilateral acts was convened to consider future work on the topic and to formulate a questionnaire regarding State practice.

B. Consideration of the Draft Articles

Discussion of draft Articles (a) and (b) was guided by the question of the extent to which the rules of treaty interpretation can be applied *mutatis mutandis* to unilateral acts. The Commission supported the Special Rapporteur's view that the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties provide a relevant framework, which can then be adapted to the *sui generis* character of unilateral acts.[69]

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[67] In 1996 the General Assembly, in Resolution 51/60, para 13, invited the Commission to examine the topic "Unilateral Acts of States" and to indicate its scope and content. At its forty-ninth session, in 1997, the Commission appointed Mr. Victor Rodríguez Cedeño as Special Rapporteur.

At its fiftieth session, in 1998, the Commission considered the Special Rapporteur's first report and decided to convene a Working Group on the topic. The Commission considered and endorsed the report of the Working Group, addressing issues related to the scope of the topic, its approach, the definition of unilateral acts and the future work of the Special Rapporteur. At its fifty-first session, in 1999, the Commission considered the Special Rapporteur's second report on the topic.

The Special Rapporteur's third report, presented at the Commission's fifty-second session, in 2000, made several revisions to the report of the previous year. Specifically, it revised the definition of unilateral acts in Article 1 (replacing previous draft Article 2). It also revised the draft articles dealing with the capacity of States to formulate unilateral acts (Article 2), persons authorized to formulate unilateral acts on behalf of the State (Article 3), and the subsequent confirmation of an act formulated by a person not authorized for that purpose (Article 4). In addition, the Special Rapporteur proposed a new version of a draft article on the invalidity of unilateral acts (Article 5). At the conclusion of its debate in the fifty-second session, the Commission decided to reconvene the Working Group on unilateral acts to continue consideration and study of draft Article 5, while draft Articles 1 to 4 were referred to the Drafting Committee.

[68] A/CN.4/519.

[69] This is in line with international jurisprudence, particularly the *Fisheries Jurisdiction* case (Spain v. Canada), where the International Court held that the interpretative rules of the Vienna Convention "may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction." *ICJ Reports 1998,* p. 453, para 46.

Uncontroversially, the Commission felt that analogies could be drawn with regard to “good faith” interpretation and the preference for the “ordinary meaning” in the interpretation of statements as stipulated in Article 31 of the Vienna Convention.

In other cases, however, analogies to the Vienna Convention appeared difficult to draw. As the Special Rapporteur noted, doctrine and case law tend to emphasize the “subjective” nature of interpretation of unilateral acts. In this regard, the “context” and “preamble and annexes”, as contained in draft Article (a), take on a more expansive meaning than they do in the Vienna Convention. Some members of the Commission, therefore, questioned the usefulness of aligning the wording of the draft articles too closely to the Treaty Convention.

While the Commission agreed that the intention of the author State(s) should be paramount in the interpretation of unilateral acts, the proposal by the Special Rapporteur to replace “in light of its object and purpose” with “in light of the intention of the author State” in Article (a) was rejected, because enlightenment on the intention of the author State precisely constitutes the very goal of interpretation.

Since the Vienna Convention was limited, by its terms, to the consideration of legal texts, in the context of unilateral acts the additional problem arises of how to identify when a unilateral act gives rise to legal effects in the first place.

Furthermore, the Commission generally felt that the nature of unilateral acts as voluntary limitations of sovereignty called for inclusion of an additional requirement of restrictive interpretation in draft Article (a).

The language of draft Article (b) is aligned to that of Article 32 of the Vienna Convention. This draft Article was relatively uncontroversial, although the Commission felt that the role of preparatory materials should be more carefully considered. It was suggested that only materials reasonably accessible to the addressee of a unilateral act ought to carry evidentiary weight (such as legislative records or public statements). Responding to this note of caution, the Special Rapporteur signalled his intent to assimilate the notion “preparatory work” with “circumstances of the formulation” in a future revision of the draft Article.

C. Future Work

The Commission agreed that the fifth report on unilateral acts of States should summarize the progress made so far on the topic. Responding to criticism of the fourth report, the Special Rapporteur also announced his intention to undertake a more comprehensive examination of silence and estoppel in future reports.

Finally, a second questionnaire on State practice was drawn up in the Working Group, concerned with three questions: whether States ever formulated a unilateral declaration or other expression of will, whether States ever relied on a unilateral act of another State regarding it as legally binding, and asking for illustrations of the particular methods of interpretation used by the State.

VII. Other Matters

A. Specific Issues on which Comments Would be of Particular Interest

In response to paragraph 14 of General Assembly resolution 55/152, the Commission indicated certain issues on which comments by Governments would be of particular interest. The text of the respective issues and questions can be found *infra* in Annex IV.

B. Long-Term Programme of Work

Having taken note of paragraph 8 of General Assembly resolution 55/152 and in order to use the available time more efficiently, the Commission decided, on the recommendation of the Planning Group, to give priority during the first week of its fifty-fourth session to the appointment of two Special Rapporteurs on two of the five topics included in its long-term programme of work.[70] It was suggested that one of these topics should be Responsibility of international organizations. The fate of the project of a Study on the fragmentation of international law was left open.

C. Cooperation with Other Bodies

Judge Guillaume, President of the International Court of Justice, informed the Commission on the Court's recent activities. An informal exchange of views followed. Moreover, representatives of the Inter-American Juridical Committee, the European Committee on Legal Cooperation, CAHDI, the Asian-African Legal Consultative Committee addressed the Commission during the present session. Further, an informal exchange of views took place between members of the Commission and members of the legal services of the International Committee of the Red Cross.

D. Date and Place of the Fifty-Fourth Session

The Commission decided next to hold a 10-week split session, which will take place at the United Nations Office in Geneva from 6 May to 7 June and from 8 July to 9 August 2002.

E. Representation at the Fifty-Sixth Session of the General Assembly

The Commission decided that it should be represented at the fifty-sixth session of the General Assembly by its Chairman, Mr. Peter C.R. Kabatsi. Moreover, the Commission requested Mr. James Crawford, Special Rapporteur on Responsibility of States for internationally wrongful acts, to attend the fifty-sixth session under the terms of paragraph 5 of General Assembly resolution 44/35.

F. International Law Seminar

For the 37th time a training seminar, organized by the United Nations Office in Geneva, was held, with 24 participants of different nationalities.

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[70] See, on these topics, *International Law Commission, Report on the work of its fifty-second session, Official Records of the General Assembly,* Fifty-Fifth Session, Supplement No. 10 (A/55/10), para 729.

ANNEX I

Draft articles on Responsibility of States for internationally wrongful acts

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I
General principles

Article 1
Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2
Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

Article 3
Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II
Attribution of conduct to a State

Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5
Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

Responsibility of a State in connection with the act of another State

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 18
Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Article 19
Effect of this Chapter

This Chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V
Circumstances precluding wrongfulness

Article 20
Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22
Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three.

Article 23
Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeur*e, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The State has assumed the risk of that situation occurring.

Article 24
Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms

Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:

(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) The question of compensation for any material loss caused by the act in question.

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
General principles
Article 28
Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30
Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33

Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II

Reparation for injury

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38

Interest

1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

Serious breaches of obligations under peremptory norms of general international law

Article 40

Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this Chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

Invocation of the responsibility of a State

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State; or

(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) What form reparation should take in accordance with the provisions of Part Two.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) The injured State has validly waived the claim;

(b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46

Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse against the other responsible States.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II

Countermeasures

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting reprisals;

(d) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between it and the responsible State;

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1(b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased, and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Article 54

Measures taken by States other than an injured State

This Chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interests of the injured State or of the beneficiaries of the obligation breached.

PART FOUR
GENERAL PROVISIONS

Article 55

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57

Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

ANNEX II

DRAFT CONVENTION ON PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES

The States Parties,
Having in mind Article 13, paragraph 1 (a) of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,
Bearing in mind the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,
Bearing also in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,
Recalling the Rio Declaration on Environment and Development of 13 June 1992,
Recognizing the importance of promoting international cooperation,
Have agreed as follows:

Article 1
Scope

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2
Use of terms

For the purposes of the present draft articles:

*(*a) “risk of causing significant transboundary harm” includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm;

*(*b) “harm” means harm caused to persons, property or the environment;

*(*c) “transboundary harm” means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

*(*d) “State of origin” means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are planned or are carried out;

*(*e) “State likely to be affected” means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;

*(*f) “States concerned” means the State of origin and the State likely to be affected.

Article 3
Prevention

The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

Article 4
Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.

Article 5

Implementation

States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

Article 6

Authorization

1. The State of origin shall require its prior authorization for:

*(*a) any activity within the scope of the present draft articles carried out in its territory or otherwise under its jurisdiction or control;

*(*b) any major change in an activity referred to in subparagraph *(*a);

*(*c) any plan to change an activity which may transform it into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft article**s.** Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles.

3. In case of a failure to conform to the terms of the authorization, the State of origin shall take such actions as appropriate, including where necessary terminating the authorization.

Article 7

Assessment of risk

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

Article 8

Notification and information

1. If the assessment referred to in article 7 [8] indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.

Article 9

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time-frame for the consultations.

2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Article 10

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9 [11], the States concerned shall take into account all relevant factors and circumstances, including:

*(*a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

*(*b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;

*(*c) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

*(*d) the degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;

*(*e) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

*(*f) the standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 11

Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding.

If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.

Article 12

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as States concerned consider it appropriate even after the activity is terminated.

Article 13

Information to the public

States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 14

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.

Article 15

Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 16

Emergency preparedness

The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.

Article 17

Notification of an emergency

The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected by an emergency concerning an activity within the scope of the present draft articles and provide it with all relevant and available information.

Article 18

Relationship to other rules of international law

The present draft articles are without prejudice to any obligations incurred by States under relevant treaties or rules of customary international law.

Article 19

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.

3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.

4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the

dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.

ANNEX III

RESERVATIONS TO TREATIES
Titles and texts of the draft guidelines adopted at the 2001 session

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when

expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3][71] Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

2.3.1 Late formulation of a reservation

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation

Unless the treaty provides otherwise or the well established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation

If a contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations

A contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

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[71] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur. Draft guideline 2.2.2 proposed by the Special Rapporteur was deleted.

(a) interpretation of a reservation made earlier; or

(b) a unilateral statement made subsequently under an optional clause.

2.4.3 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7][72] Late formulation of an interpretative declaration

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other contracting Parties objects to the late formulation of the interpretative declaration.

2.4.7 [2.4.8] Late formulation of a conditional interpretative declaration

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the conditional interpretative declaration.

[72] Draft guideline 2.4.6 proposed by the Special Rapporteur was deleted.

ANNEX IV

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION[73]

1. In response to paragraph 14 of General Assembly resolution 55/152 of 12 December 2000, the Commission indicated the following issues on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

Reservations to Treaties

(a) Conditional interpretative declarations

2. In 1997, the Commission decided to include the study of interpretative declarations in its work on the topic of reservations to treaties.[74] In 1999 it drew a distinction between "simple" interpretative declarations and conditional interpretative declarations, the definition of which is contained in draft guideline 1.2.1.[75] In moving ahead in its work, the Commission finds that the latter declarations are subject, *mutatis mutandis* to the same legal regime as reservations themselves. Should this assimilation be confirmed in regard to the effects of reservations and of conditional interpretative declarations respectively, the Commission is considering the possibility of not including in its draft Guide to Practice draft guidelines specifically relating to conditional interpretative declarations.

3. The Commission would be particularly interested in receiving comments from States in this connection and would welcome any information on the practice followed by States and international organizations in connection with the formulation and the effects of conditional interpretative declarations.

(b) Late formulation of reservation

4. In the case of the draft guidelines adopted at the present session,[76] the Commission would like to receive more particularly comments from Governments on draft guideline 2.3.1: "Late formulation of a reservation".[77]

5. This guideline has been worded so that it is understood that this practice, which is a departure from the actual definition of reservations as contained in article 2(d) of the 1969 Vienna Convention on the Law of Treaties and reproduced in draft guideline 1.1,[78] should remain exceptional in view of the practice followed by depositaries and, in particular, by the Secretary-General of the United Nations.[79] Nevertheless, some members consider that this practice, in order not to unduly encourage the formulation of late reservations, should not be embodied in the Guide to Practice. The Commission would like to receive the views of Governments on this issue.

6. Moreover, still in connection with the same draft guideline, the Commission would like to have the views of States on the advisability of using the term "objection", not within the meaning of article 20 of the 1969 Vienna Convention on the Law of Treaties of a declaration

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[73] Contained in A/CN.4/L.606 and A/CN.4/L.606 Add.1-2.

[74] *International Law Commission, Report on the work of its forty-ninth session*, *Official Records of the General Assembly,* Fifty-second Session, Supplement No. 10 (A/52/10), paras 113-115.

[75] Text in *International Law Commission, Report on the work of its fifty-first session, Official Records of the General Assembly,* Fifty-fourth Session, Supplement No. 10 (A/54/10), p. 240.

[76] See chapter VI above.

[77] "Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the reservation".

[78] Text and commentary in *International Law Commission, Report on the work of its fiftieth session*, *Official Records of the General Assembly,* Fifty-third Session, Supplement No. 10 (A/53/10), pp. 196-199.

[79] Letter from the Legal Counsel of the United Nations, LA 41TR/221 (23-1).

whereby a State objects to the *content* of a reservation, but to signify opposition to its late *formulation.*[80]

(c) Role of the depositary

7. The Special Rapporteur on reservations to treaties devoted a part of his sixth report[81] to the role of the depositary in the communication of reservations. He proposed to reproduce in the Guide to Practice, by adapting them to the particular case of reservations, the provisions of articles 77 and 78 of the 1969 Vienna Convention. The problem nonetheless arises of whether it lies with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty.

8. The Commission would like to receive the views of States on this point before adopting a draft guideline in this regard.

Diplomatic Protection

1. The Commission would welcome comments on the exceptions that may be made to the continuous nationality rule, including the conditions under which such exceptions would apply. In particular, comments would be appreciated on those exceptions to the rule concerning situations of involuntary change of nationality arising out of State succession or out of marriage or adoption.

2. The Commission would also welcome comments on the following questions relating to diplomatic protection in the context of legal persons:

(a) Do States, in practice, exercise diplomatic protection on behalf of a company when the company is registered/incorporated in the State, irrespective of the nationality of the shareholders? Or, do States, in addition, require that the majority, or a preponderance, of the shareholders of the company have the nationality of the protecting State before diplomatic protection will be exercised?

(b) May a State exercise diplomatic protection on behalf of shareholders that have its nationality when the company (registered/incorporated in another State) is injured by an act of the State of registration/incorporation?

Unilateral Acts of States

The Commission draws attention to a questionnaire prepared by the Special Rapporteur which will be circulated to Governments. The Commission encourages Governments to reply to that questionnaire as soon as possible.

[80] Possible alternatives such as “rejection“ or “opposition“ have been proposed.
[81] A/CN.4/518/Add.2, paras 156 – 170.